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No. 82-1649

In the Supreme Court of the United States

OCTOBER TERM, 1982

HECTOR ANDRES MARROQUIN-MANRIQUEZ, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTIONS PRESENTED

1. Whether the Refugee Act of 1980 reduced the burden of proving eligibility for withholding of deportation under Section 243(h) of the Immigration and Nationality Act, 8 U.S.C. (Supp. V) 1253(h).

2. Whether the Refugee Act of 1980 changed the standard of judicial review of agency decisions under Section 243(h).

3. Whether the immigration judge abused his discretion or deprived petitioner of due process by refusing to issue a subpoena duces tecum to the legal attache at the American Embassy in Mexico City.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-16) is reported at 699 F.2d 129. The decisions of the Board of Immigration Appeals (Pet. App. A-17 to A-48) and the immigration judge (Pet. App. A-49 to A-79) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on January 27, 1983. A petition for rehearing was denied on February 28, 1983 (Pet. App. A-81 to A-82). The petition for a writ of certiorari was filed on April 7, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

8 U.S.C. (Supp. V) 1253(h)(1) provides:

> The Attorney General shall not deport or return any alien * * * to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion.

STATEMENT

1. Petitioner is a native and citizen of Mexico. He entered the United States on September 18, 1977, on his misrepresentation that he was a United States citizen. Upon questioning by border patrol officers, petitioner admitted that he was a Mexican citizen and that he had presented fraudulent documents purporting to show that he was a United States citizen. Petitioner was thereafter convicted of obtaining entry into the United States without inspection and by a willfully false representation, in violation of 8 U.S.C. 1325 (Pet. App. A-2 to A-3).

On December 13, 1977, deportation proceedings were commenced against petitioner on the ground that he had entered the United States without inspection and on the basis of a false statement made to immigration authorities. See Section 241(a)(2) of the Immigration and Nationality Act, 8 U.S.C. 1251(a)(2). Prior to his deportation hearing, petitioner applied for political asylum on the ground that he would be persecuted in Mexico on account of his Marxist beliefs and his former membership in the Student Revolutionary Commission (CER), which, petitioner claimed, had become a terrorist organization. After the Department of State gave its opinion that petitioner did not qualify for asylum, the INS district director denied petitioner's application. Pet. App. A-3.

Petitioner renewed his request for asylum during his deportation hearing and also applied for withholding of deportation under Section 243(h) of the Act, 8 U.S.C. 1253(h).[1] In connection with the deportation proceedings, petitioner requested that the immigration judge issue letters rogatory to two Mexican officials and a subpoena duces tecum to the legal attache at the American Embassy in Mexico City. The immigration judge denied these requests both prior to the deportation hearing and again in his written decision (Pet. App. A-56 to A-58, A-60 to A-62).

2. Following a three-day hearing, the immigration judge found petitioner deportable under 8 U.S.C. 1251(a)(2) on the basis of his attempted use of fraudulent documentation to enter the United States and his consequent conviction under 8 U.S.C. 1325 (Pet. App. A-51 to A-54). He also denied petitioner's request for withholding of deportation under Section 243(h) (Pet. App. A-65 to A-78). The immigration judge relied on the facts that neither petitioner nor his family ever had been persecuted in Mexico, that Mexico had enacted an Amnesty Law in favor of political prisoners

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[1] In 1977, when petitioner first applied for withholding of deportation, 8 U.S.C. 1253(h) provided:

> The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to persecution on account of race, religion, or political opinion and for such period of time as he deems to be necessary for such reason.

As amended by the Refugee Act of 1980, Pub. L. No. 96-212, Section 203(e), 94 Stat. 107, 8 U.S.C. (Supp. V) 1253(h)(1) provides:

> The Attorney General shall not deport or return any alien * * * to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion.

The latter version of the provision was in effect by the time of the Board's decision, and it controls this case.

in 1978, and that petitioner had received considerable exposure while on a speaking tour of the United States, which had "endeared him to numerous persons and organizations who undoubtedly would remind the Mexican authorities that such a celebrity should not disappear" (*id.* at A-71).

The immigration judge also noted that other members of the CER had been released from custody, that petitioner had made several trips to Mexico without being apprehended, that he had been in the United States from 1974 to 1977 without applying for political asylum, and that he had applied for asylum only after his arrest in 1977. Although the immigration judge credited the testimony of petitioner's witnesses to the effect that there was some persecution of political dissidents in Mexico, he did not view that testimony as probative of the question whether *petitioner* would be persecuted if he returned to Mexico. Accordingly, the immigration judge denied petitioner's request for withholding of deportation and granted him the privilege of departing within 30 days.

3. The Board of Immigration Appeals dismissed petitioner's appeal (Pet. App. A-17 to A-48). At the outset, the Board held that petitioner's conviction under 8 U.S.C. 1325 estopped him from contesting deportability (Pet. App. A-19 to A-21).

With respect to petitioner's claim for withholding of deportation, the Board agreed with the immigration judge that, although petitioner's evidence suggested that some political repression and persecution may have existed in Mexico, it did not "establish the likelihood of this particular alien being subjected to persecution in Mexico" (Pet. App. A-27; see also *id.* at A-29). The Board also rejected petitioner's claim (*id.* at A-29) that the Mexican authorities had "accused [him] of many fabricated or 'trumped-up' criminal charges" as a means of persecuting him for his political

beliefs. The Board noted that, although in 1974 petitioner had been mentioned in various Mexican newspapers as a leader of the CER or other terrorist organizations and as a participant in criminal activity, since that time the only interest the Mexican authorities had expressed in petitioner was in connection with an alleged shootout with police in Mexico on April 23, 1974. Although petitioner denied any involvement in the shootout, the Board concluded that petitioner had not satisfactorily established that he was not involved in the incident and that, even if the charges were false, petitioner had not demonstrated that he could not get a fair trial in Mexico. Finally, the Board found it particularly "significant that [petitioner's] own expert witness, [a] law school professor and civil rights authority, a man who was quite familiar with [petitioner's] case and persecution claim, was *unable* 'to state conclusively one way or the other' whether or not [petitioner] might have a well-founded fear of persecution upon return to Mexico" (Pet. App. A-43 to A-44; emphasis by the Board; citation omitted).

4. The court of appeals affirmed (Pet. App. A-1 to A-16). Citing its prior decision in *Rejaie* v. *INS*, 691 F.2d 139 (1982), the court rejected petitioner's claim that the Refugee Act of 1980 had reduced the burden of proof required of an alien seeking withholding of deportation below that of a "clear probability" of persecution (Pet. App. A-7 to A-8).[2] The court of appeals further held (*id.* at A-8 & n.5 to A-10) that the Board's denial of petitioner's application for withholding of deportation was neither an abuse of discretion nor unsupported by substantial evidence. Finally, the court

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[2]The Board had used both the phrases "clear probability" of persecution and "well-founded fear of persecution" in its opinion in petitioner's case. See Pet. App. A-22, A-26, A-40 to A-41, A-44, A-45, A-47 n.8.

concluded that the immigration judge had not abused his discretion or deprived petitioner of due process by denying his discovery requests.

DISCUSSION

1. The question whether the Refugee Act of 1980 reduced an alien's burden of proving eligibility for withholding of deportation under Section 243(h) is already before this Court in *INS* v. *Stevic*, cert. granted, No. 82-973 (Feb. 28, 1983). Because that question is purely a legal one, we do not believe that the Court's resolution of it would be aided by consolidation with the present case.[3] Indeed, in light of the evidence adduced at petitioner's deportation hearing, it is unlikely that he could meet even the lesser showing of proof of persecution required by the Second Circuit in *Stevic*. See, *e.g.*, Pet. App. A-43 to A-44. Accordingly, since, as we explain below, petitioner has raised no other issue warranting this Court's intervention, we submit that the petition for a writ of certiorari in this case should be held pending the Court's decision in *INS* v. *Stevic* and should then be disposed of as appropriate in light of that decision.

2. Contrary to petitioner's assertion (Pet. 17-18), the decision below creates no conflict among the circuits concerning the standard by which courts of appeals should review agency denials of applications for withholding of deportation. As petitioner notes (*ibid.*), the Ninth Circuit has held that "the new, mandatory language of § 243(h) justifies replacing the abuse-of-discretion standard [of judicial review] with the substantial-evidence standard." *McMullen* v. *INS*, 658 F.2d 1312, 1316 (9th Cir. 1981). See also *Reyes* v. *INS*, 693 F.2d 597, 599-600 (6th Cir. 1982). However, while the court below (correctly, in our view)

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[3]Moreover, the government's brief on the merits in *Stevic* has already been filed. We have served a copy of our brief in that case on counsel for petitioner.

noted its disagreement with the Ninth Circuit's conclusion (Pet. App. A-8 & n.5), it expressly held (*ibid.*) that in petitioner's case it "would uphold the [Board's] determination under either standard." Furthermore, the court's conclusion that the Board's ruling was supported by substantial evidence is plainly correct (see Pet. App. A-2 to A-7). In these circumstances, review of this issue by the Court would be inappropriate.

3. The court of appeals' factbound conclusion that the immigration judge neither abused his discretion nor deprived petitioner of due process by denying his request for a subpoena duces tecum does not warrant further review. The court's ruling is correct and conflicts with no decision of this Court or any other court of appeals.[4]

Petitioner's requested subpoena duces tecum sought FBI documents from the American Embassy in Mexico City, which, petitioner alleged, would show that FBI agents there had knowledge of, and had participated in, the Mexican government's persecution of political opponents (Pet. App. A-14). Such evidence was hardly "essential" to petitioner's case (see 8 C.F.R. 287.4(a)(2)), however, in view of the fact that the immigration judge independently had found "that the FBI does have an interest in communist groups and individual communists" (Pet. App. A-61). Moreover, the immigration judge continued (*id.* at A-61 to A-62):

> At the most, * * * the FBI reports could establish that [petitioner] was politically active in Mexico. I find from the evidence of record that [petitioner] was, at least, politically active in Mexico.

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[4]Petitioner apparently has abandoned his claim that the immigration judge abused his discretion and denied him due process by refusing to issue the letters rogatory (see page 3, *supra*).

Finally, as the court below noted (Pet. App. A-15 n.11), petitioner already had the benefit of 50,000 FBI documents that one of his witnesses had obtained under the Freedom of Information Act. In these circumstances, the court of appeals correctly concluded (*id.* at A-15; footnote omitted) that "[t]he immigration judge's refusal to issue a subpoena was a realistic determination and not an abuse of discretion nor [*sic*] a denial of due process."

CONCLUSION

The petition for a writ of certiorari should be held pending the decision in *INS* v. *Stevic*, No. 82-973, and should then be disposed of as appropriate in light of that decision.

Respectfully submitted.

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